FRONT Report LINE

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CAPITOL RALLY: Rep. Craig Hosmer, sponsor of .08 legislation, joins Attorney General Nixon, seated, and representatives of MADD and law enforcement at a rally at the state Capitol. They renewed their call for tougher DWI laws.

'Straight .08' legislation progressing

THE SENATE and House have approved two bills that would reduce the blood alcohol content standard from .10 to .08.

HCS/HBs 302 and 38, sponsored by Reps. Craig Hosmer of Springfield and Sam Gaskill of Washburn, already has passed the House and is awaiting committee assignment in the Senate.

SCS/SB 36, sponsored by Sen. Morris Westfall of Halfway, has passed the Senate and will soon have a House hearing.

House passes forfeiture bill, Jake's Law: Page 2

"The overwhelming support of law enforcement has been essential in putting these two bills in a position to be passed by the legislature," said Attorney General Jay Nixon. "Thank you for your help on these bills."

He said attempts often are made to divide law enforcement, Mothers Against Drunk Driving and other supporters of the bill by proposing compromises and complicating issues.

"Research clearly shows that all drivers are impaired when their blood alcohol is above .08," Nixon said.

Internal affairs investigations may be open records

THE MISSOURI SUPREME Court on March 6 issued an opinion that could potentially change the status of reports involving internal investigations of misconduct by police officers.

The plaintiff, an officer accused of misconduct, tried to get access to an investigation that arose from a citizen complaint. The trial court found that the records were personnel records subject to closure under §610.021.

Historically, the courts have recognized that personnel records, including internal affairs investigations, are closed records subject to certain exceptions.

In *Guyer v. City of Kirkwood*, the officer claimed that the complaint involved allegations of a crime and, for this reason, the reports must be treated as criminal investigative reports under §610.100.

The Supreme Court recognized that a conflict exists between the provision addressing investigative reports and the provision addressing personnel records. The court said

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LEGISLATIVE UPDATE

House approves Jake's Law, forfeiture bill

"Jake's Law" requires check for outstanding warrants before release

The House has passed a bill that would require law enforcement agencies to check whether prisoners or arrestees have any outstanding warrants before releasing them.

HCS/HBs 144 & 46, sponsored by Rep. Dennis Bonner of Independence, would impose a criminal penalty (Class A misdemeanor) on any official who fails to conduct the outstanding warrant check.

The bill also includes HB 46, sponsored by Rep. Randall Relford of Cameron, that would increase the penalty for aiding the escape of a prisoner. Under this proposal, aiding the escape of a prisoner would be a Class B felony.

Forfeiture bill defines "seizure," requires approval to transfer property to Feds

A bill that would further clarify Missouri Forfeiture Law has been passed in the House.

HB 444, sponsored by Speaker Jim Kreider of Nixa, would define "seizure" as any point at which a law enforcement officer discovers and exercises any control over property that may be associated with criminal activity.

Once property is seized, the agency must obtain approval from the local prosecutor and judge to transfer the property to the federal government.

Under current law, agencies that receive federal forfeiture monies must obtain an audit of those monies for each fiscal year.

Any agency that intentionally or knowingly fails to comply with this provision commits a Class A misdemeanor, punishable by a fine of up to $1,000.

OPEN RECORDS

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these inconsistencies are resolved by reference to a third provision of the Sunshine Law, §610.011.1, which expresses the public policy that records of public governmental bodies are open and that exceptions are to be strictly construed.

Based on this analysis, the court held that complaints against officers that involve allegations of criminal activity will be deemed "investigative reports" even if no criminal charges are ever filed, and even if the allegations of criminal conduct are unfounded. For this reason, the investigative reports become open once the case becomes inactive, which means that once a decision is made that no criminal charges will be filed.

The impact on police personnel records is significant. The court held that the initial report of misconduct against the officer was an "incident report," which is always an open record. Second, the decision suggests that records which departments assumed were closed, such as personnel records, may be subject to disclosure.

This decision may have a chilling effect on the willingness of citizens to make complaints against officers because there is no longer any guarantee of confidentiality. Also, police executives believe that promises of confidentiality have encouraged officers to be more forthcoming in reporting the misconduct of their own.

One attorney who represents various media believed this opinion was significant because it would "authorize my media clients and the news media with an opportunity to obtain investigative reports and information contained in internal investigative reports to the extent that they involve any criminal conduct."

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UPDATE: CASE LAW

EASTERN DISTRICT

DOUBLE JEOPARDY

State v. Franklin Barber
No. 77085
Mo. App., E.D., Feb. 6, 2001

The defendant's conviction of three counts of unlawful use of a weapon did not violate the double jeopardy clause. When drafting §571.030.1, defining the crime of unlawful use of a weapon, the legislature clearly intended to allow cumulative punishments.

Courts have interpreted subsection 3 of the statute to allow for cumulative punishments for the same conduct. Subsection 4, under which the defendant was convicted, is designed to protect victims from the threat of being harmed by a weapon. Each exhibiting constitutes a separate offense because the conduct proscribed is complete upon one threatening flourish of a weapon. A subsequent exhibiting, whether separated by location, or by moments or a substantial amount of time, recreates the same danger that the statute was intended to prevent.

Also, §556.041 allows the state to prosecute and convict a defendant for separate offenses although they arise out of the same conduct.

The defendant committed separate offenses since the actions were separated in time; the defendant clearly had time to reconsider his actions; space separated the two flourishes of a knife at issue here; and the defendant formed the requisite mental state for each flourish.

WESTERN DISTRICT

DWI

State v. Monte L. Stottlemyre
No. 58040
Mo. App., W.D., Jan. 23, 2001

The court affirmed the defendant's DWI conviction and sentence as a prior and persistent intoxicated-related offender.

The result of a portable breath test given to the defendant was admissible in that §577.020 requiring Department of Health Standards to apply to breath tests do not apply to pre-arrest breath tests that are admissible to establish presence of alcohol on a person's breath and provide probable cause for arrest. The results are not used to establish blood alcohol content in determining whether a person is intoxicated.

ASSAULT OF AN OFFICER

State. v. David Matthew Summers
No. 58150
Mo. App., W.D., Jan. 23, 2001

There was sufficient evidence of the defendant's conviction of assaulting a law enforcement officer. While the state was required to show that the appellant knew or was aware that the victim was an officer, it was not required to show that the officer was performing duties imposed on him by law at the time of the alleged assault.

For the state to make a submissible case under §565.081, it was not required to show that the victim was acting constitutionally in carrying out his official duties. State evidence showing that the assault victim was an officer as defined in §556.061(17), of which the defendant was well aware, and that he was acting in his official capacity as an officer during the incident, was sufficient to make a submissible case under the statute.

FOURTH AMENDMENT, CURTILAGE

State v. William F. Edwards
No. 57870
Mo. App., W.D., Dec. 19, 2000

The trial court did not err in denying the defendant's motion to suppress evidence on the basis that law enforcement improperly entered the curtilage of the defendant's home without a warrant.

The evidence fully supported the determination that the driveway, walkway and patio areas in front of the defendant's home were open to the public, and that the defendant did not have a reasonable expectation of privacy in them. The home's front door was visible from the road as well as the driveway and walkway.

There was not a "no trespassing" sign on the property, or any other obstruction to indicate that law enforcement or any member of the public was not welcomed or allowed onto the property. Whether a driveway, walkway, front porch or other area of the curtilage of the home should be deemed open to the public, and subject to warrantless entry by police, must be determined case by case.

If an occupant has taken effective steps to protect areas of the property from view and from uninvited visitors, then a privacy interest may be found in that area sufficient to preclude police from entering it for investigative purposes without permission.

UPDATE: CASE LAW

WESTERN DISTRICT

SUFFICIENCY OF EVIDENCE, UNLAWFUL USE OF A WEAPON

State v. Jeffrey Goddard
No. 57923
Mo. App., W.D., Dec. 26, 2000

The court reversed the defendant's conviction for unlawful use of a weapon for discharging a firearm into a dwelling house, because the evidence of discharging a firearm **from within** a dwelling house was not the equivalent of discharging a firearm into a dwelling house.

Evidence showed that the defendant was alone and had fired into the walls with no bullets exiting the home.

Since the evidence clearly established that the defendant fired shots while inside the house and there was no evidence of bullet holes or spent cartridges outside the house, or that shots were fired outside the house, there was no basis in the evidence to find that the defendant shot from outside to inside the dwelling as required by §577.030.1(3).

SOUTHERN DISTRICT

INSUFFICIENT EVIDENCE

State v. Clarissa J. Agee
No. 23341
Mo. App., S.D., Jan. 25, 2001

The court reversed the defendant's conviction of possessing pseudoephedrine with the intent to manufacture a controlled substance.

While there was sufficient evidence to find that the defendant had pseudoephedrine, there was insufficient evidence to find that she intended to make meth. The record revealed a large number of pseudoephedrine tablets found in the defendant's discarded purse. This factor alone is insufficient to prove intent to make meth.

Evidence that the defendant had a propane tank in her car trunk was insufficient. The state presented no evidence that the defendant planned to use materials she possessed to make meth or that she knew how to make it.

She denied any knowledge of making meth; and no lab or manufacturing equipment or other meth-making ingredients were found in her possession.

The defendant's brief flight from police and the act of throwing tablets out the window was not enough to show violation of the statute.

VIDEOTAPING

State v. Rusty Mann
No. 23475
Mo. App., S.D., Jan. 29, 2001

In a prosecution for child molestation, the trial court properly admitted a child's videotaped statement under §492.304 in addition to the child's testimony.

The statute specifically allows for the admission of a videotape even if it duplicates the testimony. The defendant had no right to confront the child at the time the videotape was made.

The statute satisfies the confrontation requirement by requiring that the child testify at trial before the videotape can be admitted as evidence.

ACCOMPLICE LIABILITY

State v. Andrew E. Puig
No. 23541
Mo. App., S.D., Jan. 3, 2001

The court reversed and remanded the defendant's conviction of sale of a controlled substance on the basis of accomplice liability.

While there was sufficient evidence that the defendant aided and abetted a co-defendant in making a sale, the jury was improperly instructed in the disjunctive on the basis of accomplice liability.

Some jurors may have believed the defendant "aided" the co-defendant by delivering a scale to him. Other jurors may have believed the defendant "acted together with" the defendant based on the same act. The different theories of guilty created the possibility of conviction without a unanimous jury.

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Continuing education: 97.7% of officers comply

By Chris Egbert
Program administrator
Missouri Peace Officer Standards and Training (POST) Program

ON DEC. 31, 1999, Missouri peace officers were to have completed 48 hours of continuing law enforcement training. So how did they do? In the big picture, very well.

There was a 97.7 percent compliance rate for about 13,700 peace officers. Only 315 officers failed to meet the requirement.

As with most regulatory requirements, there are consequences for non-compliance. These actions have been taken against officers not in compliance:

- **Two hundred twenty-four** officer certifications (licenses) have been placed on probation. If these officers fail to meet the conditions of their probation, further disciplinary action will be taken against their certification.
- **Nine officers** have had their certifications revoked because they did not meet the continuing education requirement.
- **Two officers** did not meet the continuing education requirements, but before any action could be taken, their certifications were revoked because of other violations.
- **Ten cases** were dismissed because it was proved the officers were in compliance with the requirement, but failed to report the information to POST.
- **An additional 195** certified full-time and reserve peace officers chose to surrender their certifications thus avoiding any legal action being taken against their certification.

Since this was the first reporting period for Missouri law enforcement officers, every effort was made by POST to help officers with their compliance. A lot was learned over the past three years and changes are under way to make further improvements in the process.

The second reporting period will end Dec. 31, 2002. Officers in this reporting period should be making plans to ensure they have 48 hours of training by the end of their second reporting period.

Opinion favors crime victims in courtroom

CRIME VICTIMS in Missouri have a right to be in the courtroom throughout the trials of the defendants in their cases, Attorney General Jay Nixon said in an official AG's opinion released in February.

He said there is no rule that requires a court to exclude witnesses from either a civil or criminal trial, and that the Missouri Constitution allows a crime victim to be present regardless of whether the trial court has otherwise excluded witnesses.

Nixon cites Article I, Section 32 of the Missouri Constitution that guarantees crime victims "the right to be present at all criminal justice proceedings at which the defendant has such a right."

Also, Section 595.209 of Missouri law says a victim has certain rights to be informed of the progress of litigation against the accused perpetrator of the crime against the victim. These provisions make it clear that the legislature intended victims to have the right to observe and participate in all stages of the criminal justice system, he opined.

"For far too many years, crime victims have had to sit in the halls of Missouri courthouses while criminals have looked witnesses and jurors in the eye," he said. "This practice — known as 'invoking the rule' — should now end."

Nixon issued the opinion at the request of Buchanan County prosecutor Dwight K. Scroggins Jr.

Sheriffs team with AG to fight computer crime; workshops set

More than 50 Missouri sheriffs have designated a computer crime contact to work with the Attorney General's High Tech and Computer Crime Unit.

The sheriffs made the designations in response to a request by the unit and the Missouri Sheriffs' Association.

The High Tech and Computer Crime Unit has scheduled several workshops around the state for law enforcement this year, including one in Moberly on April 5 and one in Hillsboro in mid-May. The workshops will cover such issues as securing electronic evidence.

For more information, call unit Chief Dale Youngs at 816-889-8000.

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Top court rules officers can secure home before search warrant arrives

THE U.S. SUPREME COURT on Feb. 25 issued an 8-1 ruling that police officers may bar suspects from entering their own homes until a search warrant arrives.

The ruling, in *Illinois v. McArthur*, upheld the right of officers to detain a suspect outside his home while they wait for a search warrant. The officers had reason to believe that Charles McArthur would destroy the marijuana that they had probable cause to believe was in his home.

McArthur admitted at the hearing that if he had been allowed to enter his home, his intent was to destroy the marijuana. McArthur was prohibited from entering his home for two hours.

This decision does not create an automatic right to exclude occupants while waiting for a warrant. Officers still must be able to articulate specific reasons why they fear that evidence will be destroyed.

Also, the only control an officer can have over occupants is to keep them out of the home. Officers cannot insist that the suspects or occupants remain with them until the warrant arrives.

The opinion stated that the "police imposed a restraint that was both limited and tailored reasonably to secure law enforcement needs while protecting privacy interests."

Child abuse investigation seminar this spring

The Missouri Office of Prosecution Services is sponsoring a seminar, "Investigation and Prosecution of Child Abuse," from May 30 to June 1 at Tan-Tar-A Resort in Osage Beach.

This is an excellent program for police officers and prosecutors who must deal with these difficult cases. Along with local experts, the program will include speakers from the National Center for Prosecution of Child Abuse, with headquarters in Alexandria, Va. The course is POST-certified.

For information or to receive a registration form, call Bev Case at 573-751-0619.